

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KEURIG, INCORPORATED,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 07-17 (GMS)
)	
KRAFT FOODS GLOBAL, INC.,)	JURY TRIAL DEMANDED
TASSIMO CORPORATION, and)	
KRAFT FOODS INC.,)	PUBLIC VERSION
)	
Defendants.)	

DEFENDANTS' OPPOSITION TO KEURIG'S MOTION IN LIMINE NO. 2

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Kraft Foods Global, Inc., Tassimo
Corporation, and Kraft Foods Inc.*

Defendants Kraft Foods Global Inc., Tassimo Corporation, and Kraft Foods Inc. (collectively “Kraft”) oppose Plaintiff, Keurig, Inc.’s (“Keurig”) Motion *in Limine* No. 2 to preclude Kraft’s expert, Malcolm Taylor, “from relying on or testifying about experiments that Kraft’s employees performed on Kenco Singles cartridges.” Keurig’s argument, that experts would not reasonably rely on the testing of Kenco Singles Cartridges (“Singles Cartridge”), is based on misstatements of both Mr. Taylor’s testimony and the relevant law. As such, Keurig’s Motion should be denied.

Kraft will introduce evidence at trial that the Singles Cartridge embodies each and every element of asserted claim 1 of U.S. Patent No. 6,607,762 (“the ‘762 Patent”). Kraft will further introduce evidence that the Singles Cartridge was both: (1) in the possession of the inventor of the ‘762 Patent; and (2) in public use in the United States prior to filing date of the ‘762 Patent. In response, Keurig has attempted to prevent Kraft from introducing fact evidence of Singles shipments to the United States (Keurig’s Motions *in Limine* Nos. 3 and 4). Moreover, Keurig submits its Motion *in Limine* No. 2, as well as its first Motion *in Limine*, to exclude fact evidence of Kraft’s tests demonstrating that the Singles Cartridge includes all the elements of claim 1 of the ‘762 Patent. These motions are just part and parcel of Keurig’s strategy to mischaracterize unfavorable evidence as “prejudicial” and escape the inevitable finding that the Singles Cartridge anticipates the sole asserted claim of the ‘762 Patent.¹

ARGUMENT

I. Mr. Taylor Was Not Confused About The Singles Cartridge Tests

Keurig’s assertion that Mr. Taylor was confused or ignorant of the Singles Cartridge testing is based on selective quotations of Mr. Taylor’s deposition. [REDACTED]

¹ Both Mr. Rowan and Mr. Bentley intend to testify at trial regarding the data from their tests based upon their personal knowledge. Thus, such data is not hearsay as Keurig suggests. Mot. at 5.

[REDACTED]

But the deposition testimony shows that Mr. Taylor was actually presented with three Exhibits when he was asked "Who created this document?" and answered that he believed it was Mr. Bentley. Mot. at 2 (citing Taylor Depo. Tr. (Pl.'s Mot. Ex. 2) at 118); *Id.* at 115 ("So you've got Exhibits 13, 91 and 202 in front of you."). From the record it is not clear which document the question was referring to.

[REDACTED]

Keurig argues that Mr. Taylor did not know whether the data he reviewed was generated using the Kraft apparatus. Mot. at 2. But the deposition testimony clearly reveals that, while Mr. Taylor couldn't remember whether it was the *exact same* device used to run the tests, the test device was a Kraft-designed rig as pictured:

Q. So he used the device that's shown in Exhibit 91?

A. I assumed, yes.

...

Q. And where was the inlet piercing made in the test for Exhibit 13?

A. It was in a number of locations. It's on the drawing here, A, B, C, D, E, I think.

PL's Mot. Ex. 2 at 120 (discussing photos of the Kraft rig); Pl.'s Depo. Ex. 91 (Pl.'s Mot. Ex. 4). Finally, although Mr. Taylor did think that the needles used in Kraft's tests came from an existing brewer (Mot. at 2), it is because the needles were machined to have the same dimensions and be "very similar" to the needles in an existing brewer. Bentley Depo. Tr. (Ex. 1) at 13:3-20.

Mr. Taylor was not confused by or ignorant of the tests performed by Mr. Bentley and Mr. Rowan. Mr. Taylor was provided with three sets of test results and the transcripts from Keurig's lengthy depositions of Mr. Bentley and Mr. Rowan.² Pl.'s Mot. Ex 2 at 115:3-8. As

² As such, Keurig's citation and reliance on *Montgomery County v. Microvote Corp.*, 320 F.3d 440 (3rd Cir. 2003), discussing an expert's opinion based on a document he did not know the source, identity, or method of generation of, is wholly misplaced. Mot. at 4.

such, and as indicated in his report, Mr. Taylor simply used the tests to confirm his evaluation of the piercability of the Singles Cartridge. Pl. Mot. Ex. 1 at 8-10.

II. Mr. Taylor's Testimony Is Unrelated to Determination Of Reasonable Reliance

Keurig asserts that "Mr. Taylor's own admissions about what constitute sound engineering practices . . . demonstrate that the Kraft testing, and his review thereof, do not constitute trustworthy methods." Mot. at 2. Here, as before, Keurig's assertions are supported only by out-of-context quotes from Mr. Taylor's deposition. For example, Keurig claims Mr. Taylor stated that a competent engineer should "review[] the work that other engineers on an engineering team are doing 'on a daily basis.'" *Id.* Mr. Taylor's actual deposition testimony reveals that the urgency of the project dictates the frequency of review:

- Q. And does the lead engineer have to evaluate the work that's done by the people working under him on the team?
- A. Yes, he does usually on a daily basis all depending on the urgency of the project.
- Q. How does that work? Is it through meetings or memos or what?
- A. Meetings, e-mails, memos, personal one-to-one, all depending on the urgency or importance of the aspect that you are looking into, and sometimes you have to work with a company on the outside, you know, a supplier of materials.

Pl.'s Mot. Ex. 2 at 41:20-42:7 (emphases added).

Most importantly, Mr. Taylor's testimony was in response to questions about his commercial work in "designing packages for a specific use." *Id.* at 39:20-40:9. Neither Mr. Taylor, Mr. Bentley, nor Mr. Rowan were designing commercial consumer packaging; the Singles Cartridge was a pre-existing product that merely needed to be tested for piercability. Taylor Depo. Tr. (Ex. 2) at 178:11-179:3. In any event, in response to questioning about engineering standards, Mr. Taylor clearly stated:

When you say a standard, there really isn't any standard per se of engineering effort, if you like. There are engineering standards involved in design and drawing and symbols and all that stuff. That's a standard, but as far as how you

organize your work, how you do your work on a day-to-day basis is usually up to the lead engineer or whatever, you know.

Pl.'s Mot. Ex. 2 at 45:19-46:2. Further, when asked whether he keeps notes in a lab notebook when testing a product, Mr. Taylor stated:

It all depends at what stage you do that. In other words you can rig up a rough test to figure out if the idea works or not. On that you don't need any notes really. You would then maybe make up another test rig which would have a lot more bells and whistles on it, if you like, and you would take notes under those conditions, but on just a rough shot test, no. You just have to have observations and you remember them.

Ex. 2 at 112:20-113:4.

III. Mr. Taylor's Consideration Of Singles Cartridge Testing Was Reasonable

Keurig's motion does not question the accuracy of the test results that Mr. Taylor considers. Indeed, Keurig has had the opportunity to depose both Mr. Bentley and Mr. Rowan (Pl.'s Mot. Exs. 6 & 7) and will have the opportunity to cross examine one or both of Mr. Bentley and Mr. Rowan at trial when they are on the witness stand and demonstrate the test in open court. Keurig's argument is based solely upon the fact that Mr. Taylor has looked to test results provided by Kraft's employees to validate his own inspection and test results. In this regard, Keurig has cited to no binding authority to indicate that reliance on Kraft's tests is *per se* unreasonable under Rule 703. On the contrary, Keurig's cases are readily distinguishable.

Keurig asserts that the instant case "mirrors *In re TMI Litigation*," which pertains to the reliance of an immunologist on self-reported data of patients. Mot. at 3. Specifically, the report detailed her opinion that blood samples from individuals exposed to ionizing radiation from nuclear weapons testing exhibited immune system depression. *In re TMI Litigation*, 193 F.3d 613, 696 (3d Cir. 1999). But her report also stated that "it is undoubtedly necessary to carry out a dynamic examination of all persons" to determine whether exposure to radiation was the cause. *Id.* When challenged, the expert ruled out any other causes of immune system depression based

solely on self-reported medical data. *Id.* at 696-97. The panel noted that “[t]here is nothing improper about a medical report prepared solely for litigation. . . . However, a physician who evaluates a patient in preparation for litigation should seek more than a patient’s self-report of symptoms.” *Id.* at 698 (citations omitted). Thus, the expert “should have either reviewed her study subjects’ medical and hospital records or examined the subjects herself.” *Id.*

Mr. Taylor’s report makes clear that his consideration of the tests performed by Andrew Bentley and Lee Rowan merely *confirmed* his own investigation and tests.³ To form his opinion, Mr. Taylor considered the materials and thicknesses of the lid components (60 μ of polypropylene, 9 μ of aluminum, and 12 μ of polyester) as well as the Singles Cartridge’s internal structure. Pl. Mot. Ex. 1 at 8-9. Mr. Taylor also performed his own tests by piercing the foil at a first location to inject water and at a second location to witness outflow of “coffee liquor.” *Id.* at 9. Mr. Taylor considered the tests by Kraft employees merely to confirm his own. *Id.* (“This was confirmed by tests on the Kenco Cartridges carried out by Messrs. Andrew Bentley and Lee Rowan”). As in *TMI*, there is nothing improper about Kraft preparing a test solely for the purpose of litigation. Because Mr. Taylor does not rely solely upon those tests, he refers to them simply to confirm his evaluation of the Singles Cartridge, his reliance is not misplaced.⁴

CONCLUSION

For the above reasons, Kraft requests that Keurig’s motion *in limine* to preclude Kraft from offering any evidence of its testing of the Kenco Singles Cartridges be denied.

³ Unlike in *Mike’s Train House v. Lionel, LLC*, 472 F.3d 398 (6th Cir. 2006) and *U.S. v. Tran Trong Cuong*, 18 F.3d 1132 (4th Cir. 1994), Mr. Taylor does not intend to testify as to the opinions or conclusions of Mr. Bentley or Mr. Rowan, but merely to the fact that the data they collected confirms his own tests and investigation.

⁴ Likewise, Keurig’s citation of *Hot Wax, Inc. v. Warsaw Chem. Co.* is inapposite because the expert’s opinion in that case was “premised entirely on out-of-court statements from unnamed [] employees.” 45 F. Supp. 2d 635, 639 (N.D. Ill. 1999).

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EXHIBIT 1

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT 2

In The Matter Of:

***KEURIG, INCORPORATED v.
KRAFT FOODS GLOBAL, INC***

MALCOLM E. TAYLOR

July 3, 2008

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TAYLOR, MALCOLM E. - Vol. 1

<p>110</p> <p>1 the foil?</p> <p>2 A. Yes, it was.</p> <p>3 Q. Now, I just want to go back to something that I 4 asked you before and clarify.</p> <p>5 A. Sure.</p> <p>6 Q. I believe you testified that you don't know the 7 exact pressure at which the singles cartridges 8 ordinarily operate, but --</p> <p>9 A. No.</p> <p>10 Q. -- are you aware that the coffee bed is pressurized 11 to some degree in the normal operation?</p> <p>12 A. Yes, I'm aware. I mean it has to be in order to get 13 the water up through the filter and up over into the 14 outlet.</p> <p>15 Q. Although you said you were able to do that even 16 without pressurizing it?</p> <p>17 A. Well, only -- well, there is some pressure obviously 18 from the needle --</p> <p>19 Q. Okay.</p> <p>20 A. -- into the coffee bed, but it's -- you don't need 21 much if the rate of flow is low. If you had a high 22 flow, you'd need a much higher pressure I'm sure.</p> <p>23 Q. Okay. And in order to make a whole cup of coffee 24 under normal conditions --</p>	<p>112</p> <p>1 Q. Was your hypodermic syringe or needle test a 2 realistic test of whether that foil is pierceable to 3 accommodate an inflow under the sort of real world 4 conditions of brewing a cup of coffee?</p> <p>5 MR. SCHLITZ: Objection to form.</p> <p>6 A. That's actually within the terms of the patent and 7 its claim. I thought it was adequate because it's a 8 package design. It's not a process design.</p> <p>9 Q. Just back to my question, though, within the real 10 world conditions of brewing a cup of coffee, do you 11 think that your test was a realistic representation 12 for that?</p> <p>13 A. No. It was a test. It's not a real world making of 14 a cup of coffee.</p> <p>15 Q. Now, ordinarily -- I think we talked a little bit 16 about this before in your work at Foster-Miller. 17 Ordinarily when you are testing a product or a 18 prototype, would you ordinarily take notes in a lab 19 notebook or something?</p> <p>20 A. Not necessarily. It all depends at what stage you 21 do that. In other words you can rig up a rough test 22 to figure out if the idea works or not. On that you 23 don't need any notes really. You would then maybe 24 make up another test rig which would have a lot more</p>
<p>111</p> <p>1 A. You'd need a lot more water.</p> <p>2 Q. You need more water and --</p> <p>3 A. And a much bigger syringe, one or the other.</p> <p>4 Q. And you need a higher pressure to make that cup of 5 coffee than what you used in your test?</p> <p>6 A. I really don't think so because if you regulate the 7 water flow into it, as long as you have enough hot 8 water, you could squeeze enough in there from the 9 barrel. Say you had an inch and a half down in the 10 a barrel, you could fill it easily and have enough 11 over maybe to fill a cup, sure. You know, there is 12 no specification anywhere in either patent actually. 13 There is nothing.</p> <p>14 Q. You would agree with me that Claim 1 of the Keurig 15 Patent does require that the cartridge be capable of 16 producing a beverage, whatever that means, right?</p> <p>17 MR. SCHLITZ: Objection. You are asking 18 for a legal conclusion.</p> <p>19 BY MR. RADER:</p> <p>20 Q. Well, you read the claims, right?</p> <p>21 A. Yeah. It just means make a beverage, whatever that 22 means. There isn't any definition.</p> <p>23 Q. And you are not here to opine on that?</p> <p>24 A. No. I'm not, no.</p>	<p>113</p> <p>1 bells and whistles on it, if you like, and you would 2 take notes under those conditions, but on just a 3 rough shot test, no. You just have to have 4 observations and you remember them.</p> <p>5 Q. So in your work as an engineer if you were doing a 6 test that was going to be the test you were going to 7 rely upon for your design or your analysis, is that 8 the type of thing you would take notes on and --</p> <p>9 A. Yes.</p> <p>10 Q. -- take pictures of?</p> <p>11 A. Yes, you would of course.</p> <p>12 Q. Okay. So that the experiments you did here with the 13 hypodermic needle, they wouldn't meet the standard 14 that you would apply to the kind of test that you 15 would rely on in your engineering analysis; is that 16 fair to say?</p> <p>17 A. No. It was just an initial test in order to meet 18 the needs of the claim. That's all. There wasn't 19 any other intent.</p> <p>20 Q. All right. Now, let me ask you, in your report on 21 pages 8 to 9 of your report you also talked about 22 some tests done by Keurig engineers; is that right?</p> <p>23 MR. SCHLITZ: Keurig or Kraft?</p> <p>24 MR. RADER: Sorry. My slip.</p>

29 (Pages 110 to 113)

<p style="text-align: right;">178</p> <p>1 A. Of course.</p> <p>2 Q. Would you design it -- if in your first design you 3 had some kind of failure, would you then just accept 4 that or would you then make changes to achieve 5 success?</p> <p>6 A. You would design around them. That's what you do.</p> <p>7 Q. That's what design engineers do?</p> <p>8 A. That's what they do, yeah, absolutely.</p> <p>9 MR. RADER: Objection.</p> <p>10 A. Sure.</p> <p>11 Q. In Professor Slocum's report he criticizes 12 Mr. Bentley and Mr. Rowan because they used a test 13 rig that he said was designed for experimental 14 purposes to achieve success; do you have any opinion 15 about that statement?</p> <p>16 MR. RADER: Objection to form.</p> <p>17 A. It was only designed to prove piercing. That's all. 18 That was the intent, that it was achievable through 19 the foil.</p> <p>20 Q. But do you see -- as a design engineer and someone 21 who's been project leader, do you see any problem 22 with designing a rig that would achieve success?</p> <p>23 A. No. No, I don't. As I mentioned earlier on, you 24 would look at the issues in front of you and you</p>	<p style="text-align: right;">180</p> <p>1 A. Yes.</p> <p>2 MR. RADER: Objection, Leading.</p> <p>3 A. Yes, it is.</p> <p>4 Q. Does the fact that Mr. Rader questioned you at 5 length about statements that Mr. Bentley and 6 Mr. MacMahon expressed about the commercial product, 7 do those statements in any way change your view that 8 this lid -- ledge 23 goes the whole way around?</p> <p>9 A. No, it doesn't. That's what I indicated earlier. 10 This is my independent -- as a design engineer it 11 runs all the way around. It's designed for one lid.</p> <p>12 Q. And your opinion is based on reading the '234 13 Patent; is that correct?</p> <p>14 A. Yes.</p> <p>15 Q. And your opinion is not based on reading 16 Mr. MacMahon or Mr. Bentley's deposition; is that 17 correct?</p> <p>18 A. That's correct.</p> <p>19 Q. Let's assume for the sake of argument in this case 20 that the commercial embodiment of the Mark II had 21 two lids, would that change your opinion as to what 22 the '234 Patent shows?</p> <p>23 A. No, it wouldn't.</p> <p>24 MR. SCHLITZ: Okay. I have no other</p>
<p style="text-align: right;">179</p> <p>1 would design around them. I mean that's what you 2 use and your experience to design a rig that works, 3 if you like.</p> <p>4 Q. Now, if you turn to Taylor Exhibit 12?</p> <p>5 A. What was that again?</p> <p>6 Q. This is the '234 Patent.</p> <p>7 A. Oh, okay.</p> <p>8 Q. Now, if you turn to column 7?</p> <p>9 A. Okay.</p> <p>10 Q. Starting with line 17 it says, "In use a laminated 11 foil is sealed both along the upper edge 22 of the 12 body portion and the lower edge 23 of the body 13 portion"; do you see that?</p> <p>14 A. Yes.</p> <p>15 Q. Now, if you turn to figure 5, do you see the 23, the 16 ledge that is 23?</p> <p>17 A. Yes.</p> <p>18 Q. Does that go around the whole cartridge?</p> <p>19 A. Yes, it does.</p> <p>20 Q. And is the language that I just read to you in this 21 figure 5 where you see 23 goes around the whole 22 cartridge, is that the basis of your belief -- your 23 opinion that this discloses a structure that has a 24 single lid?</p>	<p style="text-align: right;">181</p> <p>1 questions.</p> <p>2 FURTHER EXAMINATION BY MR. RADER:</p> <p>3 Q. Just to wrap up on that one point. Mr. Taylor, you 4 also saw the testimony of Mr. MacMahon and 5 Mr. Bentley about the patent itself, right?</p> <p>6 A. Yes, I did.</p> <p>7 Q. And based on that, can you say with any degree of 8 certainty that the interpretation that this patent 9 describes the two foils is an invalid 10 interpretation?</p> <p>11 A. I think it's invalid, yeah.</p> <p>12 Q. Can you say that to a reasonable degree of 13 certainty, though?</p> <p>14 A. Yes, I can, just from my experience. That's all.</p> <p>15 Q. But again, Mr. Taylor, as I think we established at 16 the end of your testimony, since you didn't speak 17 with Mr. MacMahon or Mr. Bentley you have to take 18 their statements at deposition as true for purposes 19 of your analysis, don't you?</p> <p>20 A. That's all I could do.</p> <p>21 Q. And given that fact, don't you have to at least 22 allow for the possibility in your analysis that the 23 '234 Patent describes two lids instead of one?</p> <p>24 A. You know my own opinion is I don't see it. That's</p>

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